UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 67 | Number 1 Article 16

11-1-1988

United States v. Stanley: Military Personnel and the Bivens Action

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NOTE

United States v. Stanley: Military Personnel and the *Bivens* Action

In 1958 officials of the federal government secretly administered lysergic acid diethylamide (LSD) to James B. Stanley, a sergeant in the United States Army, pursuant to an Army study of the drug's effect on humans.[1] During World War II, the United States Military Tribunal established the Nuremberg Code as a standard by which to judge German scientists who experimented with humans. The Nuremberg Code demanded that when human experimentation took place,

> Certain basic principles must be observed in order to satisfy moral, ethical, and legal concepts: 1. The voluntary consent of the human subject is absolutely essential . . . [The human subject should consent] without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion. . . . 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.[2]

The individuals who conducted the Army LSD study failed to comply with these standards; Stanley did not consent to the LSD testing, nor did he even know that the drug was being administered to him. By the time he learned of the LSD testing program seventeen years later, Stanley had endured psychological problems, the dissolution of his marriage, and a discharge from the Army.[3]

In *United States v. Stanley*[4] the United States Supreme Court held that because Stanley's injuries arose in the course of an activity incident to his military service, he was not entitled to a damages remedy against the federal officials who violated his constitutional rights.[5] The holding raises disturbing concerns about the status of an individual's constitutional rights once he joins the nation's armed services. This Note examines the evolution of constitutional claims against federal officials, questions the wisdom of disallowing such claims when they arise in the course of military service, and concludes that the holding in *United States v. Stanley* is an unjustified bar to a serviceperson's cause of action for the violation of his constitutional rights.

Sergeant Stanley volunteered to participate in an Army program designed

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1. United States v. Stanley, 107 S. Ct. 3054, 3057 (1987).

2. United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181-82 (1949) (quoted in part in *Stanley*, 107 S. Ct. at 3066 (Brennan, J., dissenting)). Although the Nuremberg Code "does not have the authority of an American statute, decisions of the United States Military Tribunal based upon it should be considered the primary American articulation of standards governing human experimentation." Note, *Experimentation on Human Beings*, 20 STAN. L. REV. 99, 102-03 (1967).

3. *Stanley*, 107 S. Ct. at 3057.

4. 107 S. Ct. 3054 (1987).

5. *Id.* at 3063.

to test the effectiveness of equipment and protective clothing as a defense to chemical warfare. In order to participate in this program, Stanley was released from his duties at Fort Knox, Kentucky, and moved to the United States Army testing grounds in Maryland. While at the testing grounds, Stanley unknowingly ingested doses of LSD four times during February, 1958. As a result of the LSD exposure, Stanley suffered psychological and emotional difficulties including hallucinations, incoherence, impaired military performance, and memory loss. He would awake at night and violently beat his wife and children, unable later to remember the episode. The Army eventually discharged Stanley in 1969; one year later, his marriage dissolved as a result of his personality changes. In December 1975 the Army sent Stanley a letter asking for his cooperation in a further study of LSD's long-term effects on the soldiers who had participated in the 1958 tests. The letter was the Army's first disclosure to Stanley that he had been given the drug seventeen years earlier.[6]

Stanley brought an action consisting of two claims.[7] His first claim was against the United States under the Federal Tort Claims Act (FTCA) for failure to warn, monitor, or treat him after his discharge.[8] In *Feres v. United States*[9] the Supreme Court held that servicemen could not bring a claim under the FTCA for injuries which arise during activity incident to military service.[10] Nevertheless, Stanley hoped that the government's post-discharge failure to act would be treated as a separate tort that would be undisturbed by the *Feres* exception to the FTCA.[11] Stanley's second claim was against unknown individual federal officers for the violation of his constitutional rights.[12] The District Court

6. *Id.* at 3057.

7. Prior to taking any legal action, Stanley pursued an administrative claim for compensation which the Army denied. *Stanley*, 107 S. Ct. at 3057. His first legal action was to file suit under the Federal Tort Claims Act (FTCA) alleging negligence in the administration, supervision, and monitoring of the LSD testing program. *Id.* The district court granted the Government's motion for summary judgment, holding that Stanley's claim was barred by Feres v. United States, 340 U.S. 135 (1950). *Feres* had established an exception to the availability of FTCA claims for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

The United States Court of Appeals for the Fifth Circuit cleared the way for an alternative course of action by ruling that the district court should have dismissed the FTCA claim for lack of subject matter jurisdiction rather than disposing of the case on the merits. *Stanley*, 107 S. Ct. at 3057. Rejecting the argument that *Feres* precluded both FTCA and constitutional claims, the court of appeals held that Stanley could raise a constitutional cause of action according to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* established that individuals could sue federal officials for money damages when those officials violate the individual's constitutional rights. *See infra* text accompanying notes 40-49. The court of appeals therefore remanded Stanley's case for reconsideration of an amended complaint. *Stanley*, 107 S. Ct. at 3057. Stanley amended his complaint to state a constitutional cause of action and a renewed FTCA claim.

8. *Stanley*, 107 S. Ct. at 3058.

9. 340 U.S. 135 (1950).

10. *Id.* at 146.

11. *Stanley*, 107 S. Ct. at 3058; *see supra* note 7.

12. *Id.* The source of Stanley's cause of action was his fifth amendment right to be free to decide for himself whether to submit to drug therapy. Stanley v. United States, 574 F. Supp. 474, 476 n.1 (S.D.Fla. 1983). *See also* Stanley v. United States, 549 F. Supp. 327, 331 (S.D.Fla. 1982) ("This right to be free from the unwanted administration of drugs has also been associated with First Amendment rights.").

for the Southern District of Florida dismissed the FTCA claim,[13] but allowed the second claim for the violation of Stanley's constitutional rights.

The district court found that because of the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[14] Stanley could bring a cause of action for damages against the individual officers.[15] In *Bivens*, the Supreme Court held that an individual could bring a suit for money damages against federal officials who violated the individual's constitutional rights.[16] Yet, in the 1983 case of *Chappell v. Wallace*,[17] the Court prohibited military personnel from bringing such a suit to recover damages from superior officers who violated constitutional rights.[18] Examining these two cases, the district court interpreted *Chappell* to preclude a *Bivens* claim[19] only when a serviceman attempts to sue superior officers for constitutional violations which involve military discipline and direct orders in the performance of military duties.[20] Because Stanley's case concerned neither superior officers, military discipline, nor direct orders, the district court allowed Stanley's constitutional cause of action.[21]

After granting interlocutory review,[22] the United States Court of Appeals for the Eleventh Circuit affirmed the conclusion that *Chappell* did not require dismissal of Stanley's *Bivens* claim.[23] The court of appeals also held that in light

13. *Id.* The district court found that any alleged negligence occurring after discharge was not separate and distinct from the acts that occurred before Stanley's discharge. According to the district court, there was not a separate tort, and the *Feres* exception applied. *Id.*; *see supra* note 7. *Contra* Thornwell v. United States, 471 F. Supp. 344, 349 (D.D.C. 1979) (where administration of LSD during active service resulted in injuries, the court found recovery available for post-discharge injuries which resulted from the failure to provide plaintiff with follow-up medical treatment).

14. 403 U.S. 388 (1971).

15. *Stanley*, 107 S. Ct. at 3059.

16. *Bivens*, 403 U.S. at 397. The Supreme Court recognized such suits unless there were (1) "special factors" making it unwise to allow the action, or (2) an exclusive remedy provided by the legislature. *Id.* at 396-97.

17. 462 U.S. 296 (1983).

18. *Chappell*, 462 U.S. at 305.

19. Courts commonly refer to a constitutional cause of action against federal officials as a *Bivens* action or a *Bivens* claim. Similarly, courts refer to money damages in such an action as a *Bivens* remedy. This Note will adopt the terminology.

20. *Stanley*, 107 S. Ct. at 3059. In allowing Stanley's *Bivens* claim earlier in the litigation, the district court cited Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), as its sole authority for the following proposition: the same military considerations giving rise to the *Feres* exception to the availability of an FTCA claim *do not* constitute "special factors" precluding a *Bivens* action. Yet in Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court reversed this authority. Nevertheless, the district court found that *Chappell* did not apply to Stanley's factual setting; the court therefore reaffirmed its decision that Stanley had a valid *Bivens* claim.

21. *Stanley*, 107 S. Ct. at 3059.

22. The availability of interlocutory review became a contested issue in this case. When the district court originally validated Stanley's *Bivens* claim, it certified its order for interlocutory appeal. *Stanley*, 107 S. Ct. at 3058. The government argued that Stanley's failure to name individual defendants resulted in the absence of an individual to seek interlocutory review of the district court's refusal to dismiss the *Bivens* claim. *Id.* The district court granted the government's motion for partial final judgment, giving Stanley 90 days to serve at least one individual defendant. Stanley amended his complaint to name nine individuals and the Board of Regents of the University of Maryland rather than unknown parties. *Id.*

23. *Id.* at 3059.

of a recent case in the Eleventh Circuit,[24] Stanley might also have had an FTCA claim against the United States.[25] The court therefore remanded the case, ordering the district court to allow Stanley to amend his pleadings. The United States Supreme Court granted certiorari.[26]

In a majority opinion delivered by Justice Scalia with four justices dissenting, the Supreme Court found that the lower courts had interpreted *Chappell* too narrowly.[27] The Court restated that *Bivens* established the action for damages against federal officials who violate an individual's constitutional rights. Recognizing that "special factors" may preclude a *Bivens* claim, the Court targeted military discipline as a possible "special factor."[28] In *Stanley* the Supreme Court attempted to determine when military discipline should act as a "special factor" that bars a soldier's *Bivens* action: in narrow circumstances, precluding a *Bivens* claim only when it interferes with the officer-subordinate relationship; or in broad circumstances, precluding a claim any time military discipline is implicated at all.

In order to resolve this issue, the Supreme Court set out a spectrum of five possibilities.[29] The Court eventually opted for a broad preclusion, disallowing a *Bivens* action whenever a serviceman's injury arises out of activity "incident to service."[30] In choosing this alternative, the Court emphasized its earlier statement in *Chappell* that the "special factors" that bar a *Bivens* claim for constitutional violations are the same factors that established the *Feres* exception to an FTCA claim.[31] In *Feres* the Court did not consider the officer-subordinate relationship crucial, but found instead that a serviceman could not bring an FTCA action if his injury arose out of or in the course of an activity incident to military service.[32] This same "incident to service" test, according to the Court, should

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24. Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985), *rev'd*, 107 S. Ct. 2063 (1987). In order to allow Stanley a potential FTCA claim, the Eleventh Circuit relied on its earlier decision in *Johnson*. Yet, the Supreme Court eventually reversed the Eleventh Circuit.

25. *Stanley*, 107 S. Ct. at 3059.

26. *Id.* The Supreme Court was especially concerned with the lower court's misinterpretation of the holding in *Chappell*. *Id.*

27. *Id.* at 3060. Before discussing the primary issue, constitutional claims by servicemen, the Supreme Court briefly disposed of a procedural issue.

The certified order from the district court under 28 U.S.C. § 1292(b) was an order refusing to dismiss Stanley's *Bivens* action on the basis of the *Chappell* decision. The petitioners appealed from this particular order. Nevertheless, the court of appeals instructed the district court to allow Stanley to replead his FTCA claim. *Stanley*, 107 S. Ct. at 3059-60.

The Supreme Court emphasized that the Eleventh Circuit's jurisdiction was "confined to the particular order appealed from." *Id.* at 3060. The Supreme Court therefore held that the court of appeals "had no jurisdiction to enter orders relating to Stanley's long-dismissed FTCA claims." *Id.* The Supreme Court vacated this portion of the judgment.

28. *Id.* at 3060-61.

29. The five possibilities were as follows: (1) allowing military personnel to bring *Bivens* claims even against their superior officers if conduct is egregious; (2) disallowing a *Bivens* action whenever an officer-subordinate relationship is at the heart of the complaint; (3) disallowing *Bivens* actions not only in officer-subordinate situations, but whenever military discipline is affected; (4) disallowing *Bivens* actions whenever the injury arises out of activity "incident to service"; and (5) disallowing *Bivens* claims by servicemen entirely. *Id.* at 3062.

30. *Id.*

31. *Id.*

32. Feres v. United States, 340 U.S. 135, 146 (1950); *see infra* text accompanying notes 95-104.

determine whether a serviceman can bring a *Bivens* action against the federal officials who violate his constitutional rights.[33]

In deciding to tolerate very little impairment of military discipline, the Supreme Court expressed two primary concerns. First, the Court discussed the relationship between the courts and the nation's military structure. The majority recognized that it was the legislature's role to regulate the military; the Court wanted to prevent the judiciary from becoming involved in a "congressionally uninvited" area.[34] Seeking to minimize this judicial intrusion into military matters, the Supreme Court found that the *Feres* principles were superior. According to the Court, a broad exception to the *Bivens* action based on the "incident to service" test would prevent the courts from becoming overly involved in the military.[35] Second, the Court was concerned that allowing servicemen to sue federal officials would disrupt the nation's military affairs. According to the Court, a detailed analysis of whether each particular case involved military discipline would require too much intrusion into military matters. Because depositions and trial testimony often would be necessary, "the mere process of arriving at correct conclusions would disrupt the military regime."[36] The "incident to service" test, on the other hand, could be satisfied with much less inquiry into military affairs. Thus, the Court concluded that any time an injury arises in the course of an activity incident to military service, military discipline poses as a "special factor" which precludes servicemen from bringing an action for damages against federal officials who violate constitutional rights.[37]

The Supreme Court looked to the *Feres* principles to determine when the courts should dismiss a *Bivens* claim. The Court rejected the idea that a *Bivens* action should be afforded military personnel unless the officer-subordinate relationship was in jeopardy. The Court instead held that since *Feres* prevented an action by servicemen under the FTCA whenever the injury arose during an activity "incident to service," a damages action for the violation of constitutional rights should also be barred whenever the injury occured during an activity which was "incident to service." The Court reasoned that since the same concerns—discipline, judicial restraint, and military disruption—underlay the issues in both *Feres* and *Stanley,* a single principle should control in both cases. When a serviceman brings an action for damages against the federal officials who violate the serviceman's constitutional rights,

> the "special factors counselling hesitation" . . . extend beyond the situation in which an officer-subordinate relationship exists, and require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson* . . . no *Bivens* remedy is available for injuries that "arise out of or are in

33. *Stanley*, 107 S. Ct. at 3062.

34. *Id.* at 3062-63. Under the United States Constitution, "The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

35. *Stanley*, 107 S. Ct. at 3062-63.

36. *Id.* at 3063.

37. *Id.*

the course of activity incident to service."[38]

Because the court of appeals failed to dismiss Stanley's *Bivens* claim even though his injuries arose out of an activity incident to military service, the United States Supreme Court reversed this portion of the holding.[39] Stanley was without a cause of action.

In order to understand the Court's holding in *United States v. Stanley*, it is necessary to explore the origin and evolution of the action for damages against federal officials who violate constitutional rights. In the 1971 case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[40] the United States Supreme Court decided that an individual could recover money damages from a federal official who violated the individual's constitutional rights.[41] The petitioner in *Bivens* sought 15,000 dollars from various agents of the Federal Bureau of Narcotics as compensation for suffering which resulted when the agents conducted a search and seizure in violation of the fourth amendment.[42] The respondents, on the other hand, argued that rights of privacy are creations of state law and that petitioner should be allowed to collect money damages only by an action in tort under state law.[43]

The Supreme Court disagreed with the respondents' limited view of constitutional rights. The Court stressed the principle that the fourth amendment was "an independent limitation upon the exercise of federal power."[44] The Court concluded that when "petitioner's complaint states a cause of action under the Fourth Amendment, . . . petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."[45] *Bivens* stands for the principle that a violation of a constitutional right by federal officials gives rise to an action for money damages against those officials.[46]

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38. *Id.* (quoting *Chappell*, 462 U.S. at 304 and *Feres*, 340 U.S. at 146, respectively).

39. *Id.* at 3065.

40. 403 U.S. 388 (1971).

41. *Id.* In the 1946 case of Bell v. Hood, 327 U.S. 678 (1946), the plaintiffs brought an action to recover more than $3,000 in damages from FBI agents for injuries arising from the violation of their fourth and fifth amendment rights. They alleged that the agents imprisoned them and subjected their premises to an unlawful search. *Id.* at 679. The Supreme Court ruled on several issues. It sustained federal subject matter jurisdiction for the purpose of adjudicating suits brought to recover damages for the deprivation of a citizen's constitutional rights. *Id.* at 684-85. The Court found it to be "established practice for this Court to sustain the jurisdiction of federal courts to *issue injunctions* to protect rights safeguarded by the Constitution." *Id.* (emphasis added). The Court even indicated that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* Yet, despite these various hints and indications, the Supreme Court never ruled directly on the availability of money damages for the violation of constitutional rights. The *Bell* opinion even acknowledged that the "question [had] never been specifically decided by this Court." *Id.* at 684. Because *Bell* did nothing to provide a decisive resolution, the *Bivens* Court confronted the issue in 1971.

42. *Bivens*, 403 U.S. at 389-90.

43. *Id.* at 390.

44. *Id.* at 394. The Court rejected the theory that the fourth amendment acts only as a limitation upon a federal officer's defense to a state law claim. *Id.*

45. *Id.* at 397. In authorizing money damages, the Court reasoned that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. The Court also cited the language from *Bell* that "federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946) (citation omitted).

46. *Bivens*, 403 U.S. at 397; *see also* Carlson v. Green, 446 U.S. 14, 18 (1980) ("*Bivens* estab-

The Supreme Court's language in *Bivens* implied two possible situations in which a suit for money damages against a federal officer would be inappropriate. First, the Court found "no special factors counselling hesitation in the absence of affirmative action by Congress."[47] Second, the Court found "no explicit congressional declaration that persons injured by a federal officer's violation . . . may not recover money damages from the agents, but must instead be remitted to another remedy."[48] Thus, even though the general rule was that a victim may recover money damages from federal officials who violate the individual's constitutional rights, the Court recognized two exceptions. First, a court may refuse to allow an action when there are "special factors counselling hesitation."[49] Second, a *Bivens* action is unavailable when Congress has provided an exclusive and equally effective remedy.

The *Bivens* Court declined to consider whether the respondents were immune from liability because of their official positions.[50] The Court's opinion seven years later in *Butz v. Economou*[51] thus served as a generalization of the *Bivens* holding and as a comment on immunity. The complaint in *Butz* presented many causes of action, several stating claims for damages under the United States Constitution. The defendants, officials from the Department of Agriculture, claimed official immunity.[52] First, the Court stated that

> the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official.[53]

As for immunity, the Court found that the cause of action granted in *Bivens* would be worthless if federal officials received absolute immunity from liability for their unconstitutional conduct.[54] The Court held that any federal official seeking exemption from personal liability would have to prove that "public policy requires an exemption."[55]

In 1979 the Supreme Court's opinion in *Davis v. Passman*[56] provided a further refinement and application of the principles established in *Bivens*. Davis brought an action against Congressman Otto E. Passman for sexual discrimination in violation of the due process clause of the fifth amendment; she sought

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lished that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.").

47. *Bivens*, 403 U.S. at 396.

48. *Id.* at 397.

49. *Id.* at 396.

50. *Id.* at 397-98.

51. 438 U.S. 478 (1978).

52. *Id.* at 483.

53. *Id.* at 504.

54. *Id.* at 505.

55. *Id.* at 506. For a more thorough discussion of immunity principles, see *infra* text accompanying notes 144-155. For purposes of the historical development of the damages remedy against federal officials, *Butz* stands for the idea that the *Bivens* remedy will not be turned into a myth by granting federal officials absolute immunity. *Id.* at 505.

56. 442 U.S. 228 (1979).

money damages in the form of back pay.[57] The United States Court of Appeals for the Fifth Circuit held that Davis could not infer a cause of action from the fifth amendment.[58] Reversing the circuit court, the Supreme Court refined the *Bivens* doctrine by holding that individuals could bring an action directly under the Constitution. Unlike situations involving statutory rights, victims do not need a congressional mandate in order to bring an action under the Constitution.[59]

In *Davis v. Passman* the Court also applied the *Bivens* analysis to determine whether an exception should be found to the usual availability of a damages remedy for constitutional violations. First, the Court recognized that special factors may counsel hesitation in granting a *Bivens* claim against a United States congressman. Yet the concerns were not strong enough to warrant an exception; any protection from a damages action would be found in the speech or debate clause of the Constitution rather than in the judicial disallowance of a *Bivens* remedy.[60] Second, the Court found no congressional declaration that persons in Davis' position should be unable to recover money damages for injuries resulting from unconstitutional conduct.[61] Because neither the "special factors" exception nor the "legislative remedy" exception applied, the Supreme Court held that Davis could bring a money damages action for injuries resulting when Passman violated her fifth amendment rights.[62]

Carlson v. Green,[63] decided in 1980, was an important step in the development of the *Bivens* action. Joseph Jones, a federal prison inmate, died as a result of injuries sustained when federal prison officials, allegedly due to racial prejudice, provided inadequate medical attention. Jones' mother brought an action for compensatory and punitive damages for the violation of his due process, equal protection, and eighth amendment rights.[64] The issue in *Carlson* was whether an individual could assert a *Bivens* claim directly under the Constitu-

57. *Id.* at 231. Passman fired Davis, a deputy administrative assistant, because Passman felt it was essential that a man fill the position.

58. *Id.* at 232.

59. *Id.* at 241-42. The Court reached this conclusion by discussing the difference between statutory and constitutional rights. Because statutory rights are established by the legislature, Congress can dictate which parties may enforce the rights. Constitutional rights, on the other hand, are more fundamental, and the courts must act as the special guardians of these rights. Rather than insisting on a congressional mandate, the Court stated that "litigants who allege that their own constitutional rights have been violated . . . must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242. Davis was therefore held to be an appropriate party with a cause of action under the fifth amendment. *Id.* at 244.

The Court also emphasized that the money damages remedy is appropriate. First, damages have been viewed as the traditional remedy for the violation of personal liberty. Second, since Passman was no longer a Congressman and Davis could not be reinstated, Davis had no alternative form of relief. *Id.* at 245.

60. *Id.* at 246.

61. *Id.* at 247. Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1964), does not include congressional employees such as Davis. The Court decided, however, that § 717 was not meant to foreclose other possible remedies. *Davis*, 442 U.S. at 247. The Court refused to deny Davis a *Bivens* remedy simply because § 717 fails to protect congressional employees. *Id.* at 247.

62. *Id.* at 248.

63. 446 U.S. 14 (1980).

64. *Id.* at 16.

tion when his allegations would also support a claim under the FTCA.[65] After applying the *Bivens* analysis and affirming a constitutional cause of action,[66] the Court found nothing in the FTCA to suggest that Congress meant to preclude a *Bivens* remedy or to make the FTCA exclusive.[67] *Carlson*, like *Davis v. Passman*, provided an additional example of the Supreme Court holding that victims of unconstitutional conduct could sue federal officials for money damages. The Court also recognized the two exceptions to the *Bivens* rule but concluded that neither was applicable.

The *Carlson* opinion also contrasted actions based on the FTCA with actions following the *Bivens* rationale. The Federal Tort Claims Act grants individuals an action in tort against the federal government, stating that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."[68] *Bivens* provided a money damages remedy for injuries which result when federal officials violate an individual's constitutional rights.[69] In determining that the respondent was not limited to an FTCA claim, the *Carlson* Court drew four distinctions between a *Bivens* claim and an FTCA claim. First, the *Bivens* remedy has a greater deterrent effect because the *Bivens* remedy is recoverable against individuals, whereas the FTCA remedy is assessed against the United States government.[70] Second, a court may award punitive damages in a *Bivens* action, whereas they are statutorily prohibited under the FTCA.[71] Third, a plaintiff can opt for a jury trial in a *Bivens* action, but such a choice is unavailable under the FTCA.[72] Fourth, an action under the FTCA is available only if the state in which the misconduct occurred would also permit a cause of action for the same misconduct. An action for the violation of constitutional rights, on the other hand, is available regardless of provisions of state law.[73] The Court suggested that these four differences prove that the "FTCA is not a sufficient protector of the citizens' constitutional rights,"[74] and "the *Bivens* remedy is more effective than the FTCA remedy."[75]

In 1983, in contrast to cases such as *Davis* and *Carlson* in which the *Bivens*

65. *Id.* at 16-17.

66. *Id.* at 19. In establishing the existence of a constitutional claim, the Supreme Court restated the *Bivens* rule and its two exceptions. Applying the analysis, the Court found "no special factors counselling hesitation," reasoning that prison officials do not have "such independent status . . . [so] as to suggest that judicially created remedies against them might be inappropriate." *Id.*

67. *Id.* at 19-20.

68. Federal Tort Claims Act § 410(a), 28 U.S.C. § 2674 (1982).

69. *Bivens*, 403 U.S. at 397.

70. *Carlson*, 446 U.S. at 21.

71. *Id.* at 21-22. The Court acknowledged that its decisions had not expressly provided for punitive damages in a *Bivens* action, but the Court reasoned that established cases and principles indicate that punitive damages are available. *Id.*

72. *Id.*

73. *Id.* at 23. For a discussion of the relationship between these four distinctions and the *Stanley* decision, see *infra* text accompanying notes 139-43.

74. *Carlson*, 446 U.S. at 23.

75. *Id.* at 20. *But see* Bush v. Lucas, 462 U.S. 367 (1983). In *Bush* the Supreme Court did not allow a civil service employee to bring a *Bivens* action against federal employers who violated his first amendment rights. The Court decided that because Congress had provided civil servants with com-

remedy was sustained, the Supreme Court held that military personnel could not bring suit to recover damages from superior officers for alleged constitutional violations.[76] *Chappell v. Wallace*,[77] a case in which "special factors" actually precluded a *Bivens* action, became the primary authority drawn upon by the Court in *Stanley*.[78]

Unlike its analysis in the earlier cases, the Court in *Chappell* based its holding on the principle that a court must consider "special factors counselling hesitation" before it can make a *Bivens* remedy available.[79] Furthermore, the Court discovered "special factors" which made it "inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."[80] The first "special factor" was a concern for military discipline.[81] The Court wanted to avoid any disruption of the soldier-superior relationship which would result if soldiers could bring their superior officers into court on charges of unconstitutional conduct.[82] The second "special factor" was Congress' repeated activity in the field of military justice.[83] The Court believed that Congress had established

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prehensive remedies, the judiciary should not supplement this system with a judicially created remedy. *Bush*, 462 U.S. at 388-90.

The relationship between statutory remedies and the *Bivens* action has raised interesting issues. Originally, the "special factors" exception to the *Bivens* action was separate from the "exclusive legislative remedy" exception. *Bivens*, 403 U.S. at 396-97. In *Bush* Congress had not provided an equally effective substitute for the *Bivens* action. The "exclusive legislative remedy" exception did not apply. *Bush*, 462 U.S. at 378.

Nevertheless, the Supreme Court disallowed the cause of action under the "special factors" exception; the elaborate statutory procedures protecting civil servants and the extensive legislative activity in the field constituted "special factors" which precluded the *Bivens* action. Thus, the Court merged the two exceptions. *Bush* raises an important question: how extensive, meaningful, and effective must a statutory scheme be before it becomes a "special factor" which bars a *Bivens* action. For a complete discussion of this issue, see Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988).

In *Stanley* the merging of the two exceptions and statutory preclusion are not paramount issues. The *Stanley* Court specifically stated "The 'special [factor]' that 'counsel[s] hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 107 S. Ct. at 3063.

76. Chappell v. Wallace, 462 U.S. 296, 305 (1983).

77. *Id.*

78. The respondents in *Chappell*, five enlisted men in the United States Navy, brought an action against several Navy officers seeking damages for injuries resulting from constitutional violations. The men alleged that their superior officers threatened them, gave them undesirable duties, gave them low performance evaluations, and imposed severe penalties upon them because of their minority race. *Id.* at 297. The Supreme Court granted certiorari for the specific purpose of determining whether military personnel could bring a *Bivens* action against their superior officers for injuries sustained during military service as a result of constitutional violations. *Id.*

79. This step in the analysis is now mandatory. *Chappell*, 462 U.S. at 298 ("a court must take into account any 'special factors counselling hesitation' "); Bush v. Lucas, 462 U.S. 367, 378 (1982) (decided the same day as *Chappell*, the Court held that federal courts must "[pay] particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation"); *see also Stanley*, 107 S. Ct. at 3061 (discussing the "special factors" limitation to a *Bivens* claim and stating that in *Chappell* and *Bush*, "dictum became holding").

80. *Chappell*, 462 U.S. at 304.

81. *Id.* at 300.

82. *Id.* at 300-02.

83. *Id.* at 302 ("Congress has exercised its plenary constitutional authority over the military . . . taking into account the special patterns that define the military structure."). By finding that Congress' activity in the field constituted a "special factor," the Court again merged the two traditional exceptions to the *Bivens* action. *See supra* note 75.

a comprehensive system of military justice, a system which did not include a damages remedy against superior officers for the violation of constitutional rights.[84] The Supreme Court concluded that because "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' . . . enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[85]

According to the Court in *Chappell,* the "special factors" which precluded a serviceman's *Bivens* claim also formed the basis of the decision in *Feres v. United States,*[86] in which the Supreme Court prohibited a serviceman from suing the United States under the FTCA.[87] *Feres* established a broad disallowance of FTCA claims by military personnel,[88] and the *Chappell* Court sought to use a similar analysis to bar a constitutional claim. The language in the *Chappell* opinion, however, suggested that respect for officer-subordinate discipline was the true reason for dismissing the *Bivens* action.[89] The holding in *Chappell* was couched in language such as "[t]he inescapable demands of military discipline and obedience to orders . . . .";[90] "unhesitating and decisive action by officers and equally disciplined responses by enlisted personnel. . . .";[91] and "special relationship of the soldier to his superiors."[92] It was therefore uncertain whether *Chappell* established a broad or a narrow exception to the *Bivens* action.

The Supreme Court settled any confusion in *United States v. Stanley.*[93] When a serviceman brings a *Bivens* action, the "special factors" which bar his claim exist not only in the officer-subordinate relationship, but in any situation in which the injury arises out of or in the course of activity incident to service.[94] According to the *Stanley* Court, these "special factors" that prohibit a serviceman's constitutional cause of action are defined by the exception to FTCA claims established in *Feres v. United States.*[95] Thus, in order to understand when a court will dismiss a serviceman's *Bivens* claim, it is necessary to briefly review the cases which established the exception to FTCA claims.

In *Feres v. United States,*[96] decided in 1950, the issue was whether servicemen could bring an action against the United States under the FTCA for injuries

84. *Chappell,* 462 U.S. at 304.

85. *Id.* at 304-05.

86. 340 U.S. 135 (1950).

87. *Chappell,* 462 U.S. at 298-99.

88. *Feres,* 340 U.S. at 146.

89. Based on the language in *Chappell,* the district court and the court of appeals in *Stanley* concluded that *Bivens* actions should be precluded only when a serviceman brings suit against a superior officer for wrongs stemming from direct orders in situations requiring the discipline necessary to perform military duties. *See Stanley,* 107 S. Ct. at 3059. Finding such factors absent in Stanley's situation, the lower courts allowed his *Bivens* claim. *Id.*

90. *Chappell,* 462 U.S. at 300.

91. *Id.* at 304.

92. *Id.* (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting) (quoting United States v. Brown, 348 U.S. 110, 112 (1979))).

93. 107 S. Ct. 3054 (1987).

94. *Id.* at 3063.

95. *Stanley,* 107 S. Ct. at 3063.

96. 340 U.S. 135 (1950).

sustained while on active duty and attributable to the negligence of other military personnel.[97] *Feres* concluded with language which greatly influenced the *Stanley* Court thirty-seven years later: "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[98] Later cases, however, indicated that this exception to FTCA actions by military personnel was not as broad and encompassing as the *Feres* language suggested. Later opinions implied that discipline, response to orders, and officer-subordinate relations were the true foundations for the *Feres* exception to the FTCA.[99]

In *United States v. Johnson*,[100] decided just five weeks before *Stanley*, the Supreme Court clarified the "activity incident to service" test and re-established this language as a broad disallowance of FTCA claims. Lieutenant Commander Johnson, a Coast Guard helicopter pilot, was killed as a result of negligent radar assistance by an employee of the Federal Aviation Administration (FAA).[101] Because the FAA employee was a civilian, the case did not involve discipline or obedience to orders. Nevertheless, the Court declared that *Feres* prevented a serviceman's FTCA action whenever his injuries were service-related; the Court refused to modify this doctrine due to the civilian status of the tortfeasor.[102]

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97. *Id.* at 138. The case was actually a consolidation of three factual settings: the *Feres* case, where plaintiff died in a barracks fire, *id.* at 136-37; the *Jefferson* case, where an Army surgeon negligently left a surgical towel in the plaintiff's abdomen, *id.* at 137; and the *Griggs* case, where the plaintiff died due to unskilled medical treatment, *id.*

98. *Id.* at 146. According to the Court in *Feres*, Congress did not design the FTCA to create unprecedented causes of action, but instead authorized "acceptance of liability under circumstances that would bring private liability into existence." *Id.* at 141. Since no law had ever allowed a serviceman to recover for negligence against either his superior officers or the federal government, no such cause of action was recognized under the FTCA. *Id.* The Court also was persuaded by two additional concerns: first, that Congress had already provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services," and second, that local tort law should not govern the "distinctly federal" relationship between the government and enlisted personnel. *Id.* at 143-44.

Later cases commonly list three rationales as the foundation of the *Feres* exception: (1) the distinctively federal relationship between government and military personnel; (2) the availability of alternative compensation systems; and (3) the potential damage to military discipline. Atkinson v. United States, 825 F.2d 202, 204 (9th Cir. 1987).

99. For example, in United States v. Brown, 348 U.S. 110 (1954), the Supreme Court determined that injuries to a former serviceman sustained in a veterans hospital did not arise during an activity incident to service. *Id.* at 113. The Court commented that *Feres* precluded FTCA claims by military personnel because of

> [t]he peculiar and special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

Id. at 112. *See also* United States v. Shearer, 473 U.S. 52, 59 (1985) (quoting *Brown* and disallowing FTCA claim when the action would come at the expense of military discipline and effectiveness); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1976) (in shielding government from indemnity action, Court especially wanted to avoid trials which would involve second-guessing military orders or require servicemen to testify as to each other's decisions and actions); United States v. Munz, 347 U.S. 150, 162 (1962) (Court quoting the language from *Brown* and prefacing it as best explanation of *Feres*); United States v. Carroll, 369 F.2d 618, 621 (8th Cir. 1966) ("crucial question" which determines liability under the FTCA was whether soldier-superior relationship was in effect at time of accident).

100. 107 S. Ct. 2063 (1987).

101. *Id.* at 2063.

102. *Id.* at 2066-67.

Military discipline was still the factor which precluded an action, but the Supreme Court now defined the concept in broader terms:

> [M]ilitary discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.[103]

As a result of this broader definition, Johnson's widow could not bring an FTCA suit.[104]

According to the Court in *Johnson*, the injuries that "arise out of or are in the course of activity incident to service" are equivalent to any service-related injuries which could potentially implicate loyalty and commitment to the military.[105] Clearly, broadening the *Feres* exception expands the number of precluded FTCA actions by servicemen. The Supreme Court's next comment on causes of action by military personnel came just five weeks later in *United States v. Stanley*. In *Stanley* the Court declared that the *Feres/Johnson* principles should also apply to the *Bivens* claim: whenever injuries are in any way service related, "special factors preclude a *Bivens* Action by military personnel in order to protect a broad concept of discipline and loyalty."[106]

In *Bivens* the Supreme Court enabled a citizen to bring a suit for money damages against any federal official who violated the individual's constitutional rights.[107] In *Chappell* the Court found that two "special factors"—the disciplinary structure of the military and Congress' provisions for military justice—make it especially unwise to allow servicemen to bring constitutional claims against their superior officers.[108] In *Stanley* the Court held that this concern for discipline that precludes a serviceman's claim exists not only in the officer-subordinate setting, but in any situation in which injuries arise out of activity incident to military service.[109] The drug experimentation performed on Sergeant Stanley raises serious questions about whether the Supreme Court properly ex-

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103. *Id.* at 2069.

104. *Id.* In Major v. United States, 835 F.2d 641 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit reviewed four recent Supreme Court decisions including United States v. Stanley, 107 S. Ct. 3054 (1987); United States v. Johnson, 107 S. Ct. 2063 (1987); United States v. Shearer, 473 U.S. 52 (1985); and Chappell v. Wallace, 462 U.S. 296 (1983). The court of appeals concluded that as a result of these four cases, the *Feres* exception now encompasses,

> *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Major, 835 F.2d at 644-45 (6th Cir. 1987).

105. *Johnson*, 107 S. Ct. at 2069.

106. *Stanley*, 107 S. Ct. at 3063. The Supreme Court intended that both FTCA actions and *Bivens* actions be precluded when the injury is service related. The Court saw no reason why "judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits . . . ." *Id.* at 3062.

107. *Bivens*, 403 U.S. at 397.

108. *Chappell*, 462 U.S. at 304-05.

109. *Stanley*, 107 S. Ct. at 3063.

tended this "special factors" exception. The remainder of this Note will analyze the logic and fairness of the holding. The discussion will focus on three primary issues: first, whether the *Stanley* decision was a proper development of *Feres* and *Bivens* principles; second, whether the holding is consistent with the law of immunity; and third, whether the decision results in sound policy and humane treatment of military personnel.

In a sense, the *Stanley* decision was clearly in line with precedent. *Chappell v. Wallace* held that special factors made it "inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."[110] Although defendants in *Chappell* were definitely the serviceman's superior officers, the Supreme Court specifically stated that the *Feres* analysis guided the decision.[111] The *Chappell* Court at least mentioned that it did not intend to place great weight on the officer-subordinate relationship. Instead, the Court aimed for a broad exception to a serviceman's *Bivens* claim by refering to *Feres,* a case which established an exception to the FTCA whenever an injury occurred during activity "incident to service."[112] The *Stanley* Court merely elaborated the language first introduced in *Chappell,* emphasizing that the "incident to service" test governs whenever a serviceman attempts to bring a *Bivens* action.[113]

The *Stanley* decision also enjoyed the support of *United States v. Johnson.* In *Johnson* the Court enlarged the notion of military discipline from obeying orders to a general loyalty to the military.[114] This enlargement resulted in a broader prohibition of FTCA claims and therefore a broader bar to a *Bivens* action. With *Chappell* holding that concerns over military discipline preclude a

110. *Chappell,* 462 U.S. at 304.

111. *Id.* at 299.

112. *Stanley,* 107 S. Ct. at 3062-63. Prior to *Stanley,* jurisdictions appeared to be split on how seriously discipline and direct orders had to be threatened before the *Bivens* action would be precluded. Several jurisdictions strictly protected military autonomy with little concern for the degree of discipline involved. *See, e.g.,* Jorden v. National Guard Bureau, 799 F.2d 99, 107 (3d Cir. 1986) ("The clear implication of *Chappell* [was] that while some non-damage constitutional claims involving the military remain viable, damage claims do not."); Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983) ("the Court [in *Chappell*] necessarily imposed a *per se* prohibition on the filing of *Bivens*-type actions by servicemen against their superiors."). Other jurisdictions weighed the rights of servicemen against the level of discipline involved. *See, e.g.,* Shaw v. Gwatney, 584 F. Supp. 1357, 1362 (E.D.Ark. 1984) (once a serviceman alleges a constitutional violation, suitability for judicial review depends on balance between plaintiff's right and degree of interference with military affairs); Stanley v. United States, 574 F. Supp. 474, 479 (S.D.Fla. 1983) (*Chappell* only precludes *Bivens* action "for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto.").

113. *Stanley,* 107 S. Ct. at 3062-63; *see* Gaspard v. United States, 713 F.2d 1097, 1103 (5th Cir. 1983) (when former serviceman brought a *Bivens* action against federal officers for injuries resulting from exposure to radiation during testing of nuclear weapons, the court dismissed his cause of action, finding that "the rationale behind the *Feres* doctrine bars the *Bivens* claims"); Schnurman v. United States, 490 F. Supp. 429, 438 (E.D. Va. 1980) (where plaintiff's injuries resulted from a mustard gas experiment conducted while he was in the Navy, the court found *Feres* principles precluded his constitutional cause of action); Nagy v. United States, 471 F. Supp. 383, 384 (D.D.C. 1979) (in a case also involving LSD experimentation, the court found that "[a]n action sounding in constitutional, as opposed to common law, tort is not exempt for application of the *Feres* doctrine"); Misko v. United States, 453 F. Supp. 513, 516 (D.D.C. 1978) (plaintiff, seeking money damages, alleged that administration of drugs against his will violated his fifth amendment rights to liberty and due process of law; court held that "*Feres* and principles of intra-military immunity bar the particular constitutional claim").

114. *Johnson,* 107 S. Ct. at 2069.

serviceman's *Bivens* claim[115] and *Johnson* expanding the definition of military discipline,[116] the decision in *Stanley* was a very reasonable addition to *Bivens* principles.

Despite the value of *Chappell* and *Johnson* as precedent for *Stanley,* however, the factual differences between *Chappell* and *Stanley* cannot be ignored when analyzing the concept of military discipline. In *Chappell* the soldiers brought suits against superior officers well known to them.[117] In *Stanley* the relationship between Sergeant Stanley and the individuals who administered the LSD was unknown.[118] Because Stanley did not report routinely to these officials and was not aware of the testing, the military discipline factor was arguably absent in *Stanley.* Although the Supreme Court recognized this distinction, the Court cited a broader concern for military discipline and decided that constitutional claims should be prohibited whenever the *Bivens* action could generally affect loyalty to the military.[119]

Yet, the Supreme Court heightened its concern over military discipline without adequate justification. The *Chappell* decision at least protected the day-to-day ability of superior officers to command their troops. The decision enabled officers to issue orders without the fear that enlisted personnel would bring constitutional claims against them.[120] The Court's goal was clear and specific. The *Stanley* decision, however, protected a general concept of discipline rather than specific officers.[121] Protecting military discipline is very important when the immediate superior-subordinate relationship is at stake. On the other hand, protecting an abstract notion of discipline and loyalty has very little practical impact. A decision with such sparse practical effect should not justify the denial of a soldier's constitutional rights. The Court appeared to protect discipline for discipline's sake.[122] The Court's additional concern, a desire to limit intrusion into military affairs by the judiciary,[123] provided more justification than the illu-

115. *Chappell,* 462 U.S. at 304.

116. *Johnson,* 107 S. Ct. at 2069.

117. *Chappell,* 462 U.S. at 297.

118. *Stanley,* 107 S. Ct. at 3058.

119. *Id.* at 3063. *See also* United States v. Johnson, 107 S. Ct. 2063, 2069 (1987) ("military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country.").

120. *Chappell,* 462 U.S. at 304.

121. *Stanley,* 107 S. Ct. at 3062.

122. In discussing the circumstances under which a *Bivens* claim should be precluded, the Court proposed five possibilities. *Stanley,* 107 S. Ct. at 3062; *see supra* note 29. The third possibility was to disallow the *Bivens* claim "when it affirmatively appears that military discipline would be affected." *Id.* The fourth possibility, which became the Court's holding, was to disallow the *Bivens* action "whenever the injury arises out of activity 'incident to service.' " By choosing the fourth alternative instead of the third, the Court displayed concern for an overly vague notion of discipline that apparently goes beyond the normal usage of the term. *Id.*

See also Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine,* 95 YALE L.J. 992 (1986). Schwartz argued that "the military's interest in such strict discipline cannot be the value of discipline for its own sake, or even for the sake of performing the military's wide range of non-combat functions; its interest ultimately lies in the connection between discipline and combat readiness and effectiveness." Schwartz then maintained that combat effectiveness is not correlated with blind obedience to commands. *Id.* at 1007 (footnote omitted). Though Schwartz was discussing *Feres,* his comments about discipline apply to *Stanley* as well.

123. *Stanley,* 107 S. Ct. at 3063. The *Stanley* Court wanted to minimize judicial intrusion into

sory goal of protecting an abstract idea of military discipline. Yet, in a properly maintained military structure, violations of a soldier's constitutional rights should be very rare. Thus, judicial intrusion into military affairs would seldom occur. The Court therefore allowed the possibility of occasional intrusions into military affairs to outweigh the protection of rights guaranteed by the Constitution.[124]

It is also questionable whether the Court in *Stanley* should have based an exception to a constitutional cause of action on the *Feres* exception to the FTCA. Perhaps the Court should subject the intentional violation of fundamental constitutional rights to greater scrutiny than negligent acts.[125] Perhaps constitutional torts should be judged differently than negligent torts. Justice Brennan apparently agreed with this idea by devoting a portion of his dissent to an analysis of whether the *Feres* rationales should apply to the *Bivens* claim.[126]

Justice Brennan repeated the three rationales underlying the *Feres* exception to the availability of FTCA claims:[127] (1) various state tort laws should not govern the "distinctly federal" soldier-government relationship;[128] (2) an efficient system of justice and compensation is already in place within the military;[129] and (3) recognition of a soldier's FTCA claim would impair military discipline.[130] The first *Feres* rationale did not apply to a *Bivens* action because uniform federal law would govern the *Bivens* action.[131] The second rationale did not apply to a *Bivens* action because the Veteran Benefits Act does not address constitutional violations unless the resulting injury can be defined as "disabling."[132] Only the third rationale, a concern for military discipline, could reasonably apply to both FTCA and *Bivens* actions.[133] According to Brennan, however, no component of military discipline contemplated in *Feres* existed in *Stanley*.[134] First, obedience to orders was not implicated because Stanley was unaware of the experiment, and civilians may have overseen the LSD testing

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military matters, because the Constitution gives Congress, not the judiciary, the authority to regulate the military. *See supra* text accompanying notes 34-35. Yet, the Court failed to reconcile this goal with the principle that "justiciable constitutional rights are to be enforced through the courts." Davis v. Passman, 442 U.S. 228, 242 (1979).

124. *See* Schwartz, 95 YALE L. J. at 1004, where the author stated, "there is a recognized public interest in having a military establishment that is not entirely closed, monolithic, and secretive." Schwartz also suggested that allowing a *Bivens* remedy would not result in an explosion of litigation. *Id.* at 1005. He hypothesized that "because a *Bivens* action must allege the tortious violation of a constitutional right, the *Bivens* action might screen out claims less deserving of the level of deterence generated by damage awards in federal court." *Id.* at 1015 (footnote omitted).

125. *Stanley*, 107 S. Ct. at 3074 (Brennan, J., dissenting). "*Bivens* involves not negligent acts, but intentional constitutional violations that must be deterred and punished." *Id.*

126. *Id.* at 3074-76.

127. *Id.* at 3074-76; *see supra* note 98.

128. *Stanley*, 107 S. Ct. at 3074 n.23 (Brennan, J., dissenting).

129. *Id.* (Brennan, J., dissenting).

130. *Id.* at 3074 (Brennan, J., dissenting).

131. *Id.* at 3074 n.23 (Brennan, J., dissenting).

132. *Id. See* Veterans Benefits Act, 38 U.S.C. §§ 301-362 (1982); Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the Feres Doctrine*, 23 A.F. L. REV. 171, 197-99 (1982-83).

133. *Stanley*, 107 S. Ct. at 3074 (Brennan, J., dissenting).

134. *Id.* at 3074-76 (Brennan, J., dissenting).

program.[135] Second, judicial intrusion into military matters was not a valid concern because today, the judiciary is generally involved in military matters in connection with several types of action.[136] Third, the "vigor of military decisionmaking" component of *Feres* was less applicable to a *Bivens* action than to an FTCA claim, because officers should have a duty to consider whether their actions comply with the Constitution.[137] Brennan concluded that because *Feres* rationales do not apply to a *Bivens* action by servicemen, *Feres* should not control such an action.[138]

Finally, the 1980 case of *Carlson v. Green*[139] reveals the illogic of allowing *Feres* principles to guide a *Bivens* action. In *Carlson* the Supreme Court carefully cited four differences between a *Bivens* remedy and an FTCA remedy: (1) the *Bivens* remedy is a stronger deterrent because the defendants are individuals rather than the federal government; (2) a *Bivens* suit allows punitive damages; (3) a plaintiff can opt for a jury trial in a *Bivens* action; and (4) a *Bivens* claim is available despite the unavailability of an identical claim under state law.[140] The *Carlson* opinion indicated that "the *Bivens* remedy is more effective than the FTCA remedy."[141] Despite these clear distinctions between *Bivens* and FTCA claims, the *Stanley* Court later found that servicemen are precluded from bringing *either* claim when their injuries arise out of or are in the course of activity incident to service.[142] It was inconsistent for the Supreme Court to designate the *Bivens* action as the superior protection of constitutional rights, but later subject the *Bivens* action to the same exceptions which bind the FTCA

135. *Id.* at 3074 and nn. 25-26 (Brennan, J., dissenting).

136. *Id.* at 3075 (Brennan, J., dissenting). For examples of situations in which the judiciary is already involved in military matters, *see Stanley,* 107 S. Ct. at 3075 n.27 (Brennan, J., dissenting).

137. *Id.* at 3075 (Brennan, J., dissenting). *See also* Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine,* 95 YALE L. J. 992 (1986). Examining the effects of a damages remedy on military decisionmaking, Schwartz suggests that different levels of protection should be afforded military officers depending on the type of activity involved: "a strategic or tactical decision during wartime may be entitled to the utmost protection from judicial intrusion, whereas a decision to test the usefulness of LSD . . . deserves less protection." *Id.* at 1005-06 (citation omitted). Schwartz recommended particularized inquiry into each military activity to determine whether protection of decisionmaking during that activity is justified. *Id.* at 1006. *Contra* Jaffee v. United States, 663 F.2d 1226, 1236 (3d Cir. 1981), *cert. denied,* 456 U.S. 972 (1982) (if a battlefield and non-battlefield distinction prevailed, soldiers could bring suits for injuries occurring during basic training or wartime maneuvers; such suits would undermine officer decisionmaking).

138. *Stanley,* 107 S. Ct. at 3076 (Brennan, J., dissenting) ("If those concerns are not implicated by a soldier's constitutional claim, *Feres* should not thoughtlessly be imposed to prevent redress of an intentional constitutional violation."); *see also* Gaspard v. United States, 713 F.2d 1097, 1102-03 (5th Cir. 1983), *cert. denied,* 469 U.S. 975 (1985) (Although *Feres* doctrine barred the *Bivens* claim in this particular situation, "the *Feres* bar . . . does not automatically preclude the *Bivens* claim."); Thornwell v. United States, 471 F. Supp. 344, 355 (1979) (when part of soldier's complaint alleged that federal officials had administered LSD to him, plaintiff's *Bivens* claim was found to state a valid cause of action despite the dismissal of separate FTCA claims).

Brennan appeared to recommend moving away from an "incident to service" test in favor of precluding the claim only to prevent disruption of the officer-subordinate relationship. He stated, "[u]nless the command relationship . . . is involved, these violations should receive moral condemnation and legal redress without limitation to that accorded negligent acts." *Id.* at 3075 (Brennan, J., dissenting).

139. 446 U.S. 14 (1980).

140. *Carlson,* 446 U.S. at 21-23; *see supra* text accompanying notes 63-75.

141. *Carlson,* 446 U.S. at 20.

142. *Stanley,* 107 S. Ct. at 3060-63; Chappell v. Wallace, 462 U.S. 296 (1983).

action.[143]

In short, the *Stanley* decision is an unnecessary and illogical extension of precedent. Though "special factors" should preclude a *Bivens* claim by military personnel under certain circumstances, *Stanley* extended the concept of military discipline beyond the officer-subordinate setting to a loyalty concept of military discipline without a concrete justification or a practical effect. In order to protect this broader concept of discipline, the Supreme Court borrowed the "incident to service" test from *Feres*. By relying on *Feres* principles, the Court failed to appreciate the clear distinctions between constitutional violations and negligence.

The second major analytical issue is whether the *Stanley* decision harmonizes with principles of governmental immunity.[144] An overriding principle in the law of immunity is that all citizens, including federal officials, are subject to federal law.[145] *Butz v. Economou*[146] established that "qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations,"[147] and that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption."[148] Although this general rule of qualified immunity is subject to exceptional circumstances conferring absolute immunity,[149] situations involving national security are not *per se* considered exceptional circumstances. In *Mitchell v. Forsyth*[150] the Supreme Court held that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity."[151] In *Scheurer v. Rhodes*[152] officers in the executive branch of a state government were provided qualified immunity only, even though their actions involved direct military or-

143. *But see* Jaffee v. United States, 663 F.2d 1226, 1234 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982):

> The first distinction between this case and *Feres*—the fact that here suit was brought against government officials rather than against the government—provides a *stronger* argument for not allowing suit than in *Feres*. Suits against individuals have a far greater potential for chilling responsible decision-making than those against the government.

Id.

144. Justice Brennan devoted the second portion of his dissenting opinion to criticizing the majority decision as a grant of absolute immunity. *Stanley*, 107 S. Ct. at 3068-73 (Brennan, J., dissenting). Justice Scalia, delivering the opinion for the majority, reserved the final section of his opinion for a response to Brennan's criticism. *Id.* at 3064-65. The result is a complicated Brennan-Scalia debate about whether the holding in *Stanley* contradicts principles of immunity.

145. Butz v. Economou, 438 U.S. 478, 506 (1978).

146. 438 U.S. 478 (1978).

147. *Id.* at 508.

148. *Id.* at 506; *see also* Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987) (government officials receive qualified immunity; liability depends on the objective legal reasonableness of their actions); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("cases make plain that qualified immunity represents the norm").

149. *Butz*, 438 U.S. at 507.

150. 472 U.S. 511 (1985).

151. *Id.* at 523.

152. 416 U.S. 232 (1974).

ders.[153] Thus, under the present state of the law, "qualified, rather than absolute, immunity is the norm for government officials, even in cases involving military matters."[154] Federal officials seeking any greater protection bear the burden of proving that absolute immunity is essential.[155]

The question becomes whether completely precluding a serviceman's *Bivens* action because of "special factors" is equivalent to granting the violating federal officials absolute immunity, thereby departing from the common law rule of qualified immunity.[156] In a sense, the *Stanley* decision is consistent with the principles of qualified immunity. The *existence* of a cause of action, after all, is a completely separate issue from the degree of immunity for certain defendants.[157] In *Stanley* the Supreme Court can be seen as merely deciding whether a *Bivens* cause of action *exists*.[158] In the process, the Court determined whether any "special factors" were strong enough to preclude the cause of action. Thus, the Court refused to define the *Bivens* action solely in terms of immunity principles; the Court rejected an analysis under which it would be forced to provide a *Bivens* action simply because prohibiting such an action would give certain parties absolute immunity.[159] Instead, the Supreme Court consistently followed the approach mandated by *Chappell*: assume the availability of a *Bivens* claim, but preclude such a claim if "special factors" counsel hesitation.[160] Immunity for particular defendants should not even be considered until after the cause of action has first been recognized and defined.[161]

On the other hand, the Supreme Court recognized the *Bivens* action seventeen years ago.[162] The *Stanley* decision essentially is concerned not with defining the *existence* of a *Bivens* claim, but with defining an *exception* to the *Bivens* claim. From this perspective, preventing potential plaintiffs from bringing the claim because of "special factors" is identical to providing potential defendants with absolute immunity.[163] Both inquiries involve an exception to the usual

153. *Id.* at 247.

154. *Stanley*, 107 S. Ct. at 3072 (Brennan, J., dissenting); *see generally* Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982). Jaffee, a soldier in the United States Army, was ordered to stand in a field as a nuclear device was exploded a short distance away. *Id.* at 1229. The majority refused to allow a *Bivens* action. *Id.* at 1239-40. In dissent, Gibbons noted, "the generally applicable federal law of official immunity announced in *Butz v. Economou* would not provide absolute immunity for these defendants." *Id.* at 1255 (Gibbons, J., dissenting).

155. *Butz*, 438 U.S. at 506.

156. *Stanley*, 107 S. Ct. at 3069-70 (Brennan, J., dissenting).

157. *Id.* at 3064. "The availability of a damages action under the Constitution for particular *injuries* (those incurred in the course of military service) is a question logically distinct from immunity to such an action on the part of particular *defendants*." *Id.*

158. *Id.*

159. *Id.*

160. *Id.* Scalia maintained that the "special factors" limitation was an analytical step above and beyond immunity. In attacking Brennan's position, Scalia stated, "the rule the dissent proposes is not an application but a repudiation of the 'special factors' limitation upon the inference of *Bivens* actions. That limitation is quite hollow if it does nothing but duplicate pre-existing immunity from suit." *Id.* at 3064-65.

161. *Id.*

162. *Bivens*, 403 U.S. at 397.

163. *Stanley*, 107 S. Ct. at 3069 (Brennan, J., dissenting); *see also* Cross v. Fiscus, 830 F.2d 755, 756 (7th Cir. 1987)(military personnel need not worry about qualified and absolute immunities when

availability of a *Bivens* action. As Brennan stated in his dissent:

> [There is no] dispute that the question whether a *Bivens* action exists is "analytically distinct from the question of official immunity from *Bivens* liability" . . . [the dissent contends] only that the "special factors" analysis of *Bivens* and the functional analysis of immunity are based on identical judicial concerns.[164]

Thus, with the *Bivens* action already recognized and firmly entrenched under various circumstances,[165] *Stanley* is clearly a case in which the Supreme Court considers whether to find an exception.

By deciding that "special factors" warrant an exception to the *Bivens* action when military personnel bring a claim against federal officials, the Supreme Court necessarily has granted certain officers absolute immunity from money damages. Yet, the Court provided absolute immunity without demanding the requisite showing that public policy requires such immunity.[166] Total immunity from damages liability diminishes the value of the *Bivens* action and seriously endangers the constitutional rights which a *Bivens* remedy was designed to protect.[167] The *Stanley* decision is therefore inconsistent with *Butz v. Economou,* [168] in which the Court was careful to avoid such a result.[169] The majority should have realized that the holding in *Stanley* was inconsistent with the Supreme Court's established principle of qualified immunity.

Questions about whether *Stanley* logically followed precedent,[170] and whether *Stanley* improperly granted absolute immunity[171] raise complex legal issues which are far removed from the reality that James Stanley was given large doses of LSD without his consent or his knowledge. He suffered psychological disturbances adversely affecting his marriage and his military career.[172] An action to enjoin the Army's conduct was, of course, out of the question.[173] His alternative, a money damages remedy, was barred by the Supreme Court because his injuries resulted from Army drug testing, an activity considered inci-

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sued by other members of the military because *Bivens* doctrine does not apply to injuries in the course of military service).

164. *Stanley,* 107 S. Ct. at 3069 (Brennan, J., dissenting).

165. *See, e.g.,* Carlson v. Green, 446 U.S. 14 (1980) (against federal prison officials); Davis v. Passman, 442 U.S. 228 (1979) (against a former congressman); *Butz,* 438 U.S. 478 (1978) (against Department of Agriculture employees); *Bivens,* 403 U.S. 388 (1971) (against narcotics agents); *see supra* text accompanying notes 40-75.

166. *Stanley,* 107 S. Ct. at 3072 (Brennan, J., dissenting) ("The case should be remanded and respondents required to demonstrate that absolute immunity was necessary to the effective performance of their functions.").

167. *Id.*

168. 438 U.S. 478 (1978).

169. *Butz,* 438 U.S. at 505 ("The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.").

170. *See supra* text accompanying notes 110-43.

171. *See supra* text accompanying notes 144-69.

172. *Stanley,* 107 S. Ct. at 3057.

173. The *Stanley* decision did not deny servicemen an action "to halt or prevent the constitutional violation." *Id.* at 3063. Still, Stanley could not enjoin conduct which took place nearly thirty years ago. Even in 1958, he could not have enjoined the action because he was unaware that the Army was using him for drug experimentation. *Id.* at 3057.

dent to his military service. When isolated in terms of James Stanley's individual story, the holding seems unjust. The third major issue therefore concerns the extent to which the courts will subordinate human rights in order to avoid the breakdown of military discipline.

Assuming that the Court correctly precluded Stanley's *Bivens* action because his injuries arose during activity "incident to service," the paramount question becomes whether drug testing should be considered an activity incident to military life. The majority paid remarkably little attention to this issue. Stanley argued that there was no evidence that his injury was incident to service,[174] but the Court quickly disposed of his argument because the issue had been decided against Stanley by the court of appeals.[175] Apparently, both the Supreme Court and the court of appeals gave relatively little consideration to two important factors: first, that Stanley neither consented to nor had knowledge of the LSD testing,[176] and second, that the Army may have been out of its realm in conducting drug experiments on human beings.

Justices O'Connor and Brennan clearly contemplated this idea. In her dissent, O'Connor agreed with the majority's analysis, accepting the idea that a *Bivens* action is unavailable when the injuries arise out of or are in the course of activity incident to service.[177] It was O'Connor's view, however, that "conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."[178] Justice Brennan maintained that soldiers subjected to the LSD tests were treated "as though they were laboratory animals."[179] Thus, drug testing on human beings by the United States Army, especially without the soldier's consent and without adequate disclosure, could certainly be considered activity beyond the reasonable limits of military service *as a matter of law.* Instead of simply deferring to the factual findings of the court of appeals, the Supreme Court should have explored this possibility, giving full consideration to the high value of military personnel and the impropriety of encouraging the Army to engage in human experimentation. The Court's failure at least to consider this issue constitutes a major gap in the opinion.

The Court's opinion also indicates an insufficient consideration of the public policy consequences of the holding. As previously discussed, the Supreme Court protected a vague concept of loyalty to the military. The decision went beyond the officer-subordinate relationship with little practical effect. Yet, the

174. *Id.* at 3061.

175. The court of appeals considered various factors in concluding that Stanley's injuries arose during an activity incident to service. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1152 (5th Cir. 1981). The court considered the fact that Stanley was in the Army; that the experiment was conducted on an Army base and for the Army's benefit; and that he received military pay and was promised a letter of commendation. *Id.* The court of appeals rejected the argument that drug testing could never be a lawful part of military service, relying on Lerner v. United States, No. 76 Civ. 4349 (S.D.N.Y. Jan. 16, 1978), *aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978), and Loeh v. United States, No. 77-2065-B and 77-2023-B (S.D. Ill. April 23, 1979).

176. *Stanley*, 107 S. Ct. at 3057.

177. *Id.* at 3065 (O'Connor, J., dissenting).

178. *Id.* (O'Connor, J., dissenting).

179. *Stanley*, 107 S. Ct. at 3066 (Brennan, J., dissenting).

Stanley decision will not only fail to advance military discipline, but it potentially could harm it. If, as Brennan feared, government officials are now "free to violate the constitutional rights of soldiers without fear of money damages,"[180] respect for the constitutional rights of enlisted personnel could diminish. Collective morale could decline as servicemen watch violations against their comrades go without redress, and the overall result of *Stanley* could be to erode the mutual respect between officers and enlisted personnel which is vital to an efficient military system.[181] In addition, the possibility of suffering dreadful violations of constitutional rights will do little to encourage recruits to join the nation's armed services. In targeting military discipline as a policy objective, the Court should have paid greater attention to the signals which *United States v. Stanley* ultimately would send to existing and potential military personnel.

United States v. Stanley leaves military personnel without a damages remedy against federal officials who violate constitutional rights, as long as the resulting injuries occur during an activity which is incident to military duty.[182] While military personnel can still enjoin unconstitutional conduct,[183] this relief is inadequate because servicemen would have to either anticipate violations or be subject to continuing violations. Neither possibility is likely.[184] In its zeal for military discipline, the Supreme Court has tangled its priorities. Not only has the Court placed military discipline and military autonomy above constitutional rights, but it has overinflated military discipline into a concept which is implicated any time injuries are service-related. This approach places very few limits on conduct and would seem to tolerate even a malicious violation of constitutional rights.[185]

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180. *Id.* at 3067 (Brennan, J., dissenting).

181. *See* United States v. Johnson, 107 S. Ct. 2063, 2074 (1987) (Scalia, J., dissenting) ("the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered").

It is interesting to note that Justice Scalia dissented in *Johnson* but authored the majority opinion in *Stanley*. Scalia explained this apparent inconsistency by discussing judicial intrusion into military concerns. By passing the FTCA, Congress gave the judiciary the authority to become involved in military matters. On the other hand, the United States Constitution is the source of the *Bivens* action. The Constitution gives Congress, not the judiciary, the authority "to make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. Thus, in the *Bivens* context, the Supreme Court derives its power from inference rather than from statute. *Stanley*, 107 S. Ct. at 3062.

Scalia therefore reasoned that the Court is more appropriately involved in FTCA actions than in *Bivens* actions. As a result, a military exception to the *Bivens* action is more important than a military exception to an FTCA action. Thus, Justice Scalia dissented in *Johnson* because the FTCA authorized judicial involvement; Scalia authored the majority opinion in *Stanley* because he considered judicial restraint appropriate in the *Bivens* context. *Stanley*, 107 S. Ct. at 3062 & n.5.

182. *Stanley*, 107 S. Ct. at 3063.

183. *Id.* The Court emphasized that it was not barring military personnel from all redress, particularly not "redress designed to halt or prevent the constitutional violation." *Id.*

184. If the military ever reached a state of affairs in which violations of constitutional rights became continuous, a damages remedy would become even more necessary.

185. *See Stanley*, 107 S. Ct. at 3076 (Brennan, J., dissenting) (Brennan could not "comprehend a policy judgment that frees all federal officials from any doubt that they may intentionally and in bad faith violate the constitutional rights of those serving in the Armed Forces.").

As an illustration of the absurd results which the "incident to service" test can potentially produce, see James v. United States, 358 F. Supp. 1381 (D.R.I.), *vacated*, 502 F.2d 1159 (1st Cir. 1973). James, a member of the United States Navy, was arrested by base security for disorderly

The nation's military personnel deserve better treatment from the judiciary. As Justice Brennan conscientiously stated, "[S]oldiers ought not be asked to defend a Constitution indifferent to their essential human dignity."[186] Legally, the Supreme Court was faced with the possibility of extending a very narrow exception to the *Bivens* action. Factually, the Court was faced with inexcusable disrespect for the bodily integrity, human dignity, and the constitutional rights of an American soldier. The Supreme Court deprived James Stanley of his cause of action out of concern for loyalty to the armed services, but the Court failed to explain the connection between submitting to LSD tests and loyalty to one's country. The result is not only disappointing, but legally and morally questionable as well.

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conduct and was taken into custody. While in a guard house awaiting a sobriety test, James was fatally beaten by a military security guard during an argument. *Id.* at 1382. The district court held "James' injuries arose out of or were in the course of activity incident to service and that recovery against the government under the Federal Tort Claims Act [was] barred." *Id.* at 1385. Even though the decision involved an FTCA claim and even though it was eventually vacated and remanded, the case is a good illustration of how the courts may tend to interpret the "incident to service" test too broadly.

186. *Id.* at 3077 (Brennan, J., dissenting); *see also* Jaffee v. United States, 663 F.2d 1226, 1262 (3d Cir. 1981) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982):

> A decision which eliminates an important means of access to the courts—a means which in some cases may be the last resort in face of efforts at concealment—is a major assault upon an important citadel of Amercian democracy: military accountability to civil government. The decision embodies a public policy that is affirmatively evil. Rather than a "special factor counselling hesitation," the military status of the victims and perpetrators is a special factor calling for vigilance.